

STATE OF MICHIGAN
COURT OF APPEALS

RAY M. TOMA, P.C.,

Plaintiff-Appellee,

v

RONALD SCOTT CONSTABLE and TAMARA
CONSTABLE,

Defendants-Appellants.

UNPUBLISHED

August 11, 2005

No. 252970

Oakland Circuit Court

LC No. 03-051332-CK

Before: Zahra, P.J., and Gage and Murray, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's order that denied their motion to set aside default and granted plaintiff's motion for entry of a default judgment. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

We review a trial court's decision to enter a default for an abuse of discretion. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). Likewise, a ruling on a motion to set aside a default or a default judgment is subject to the same standard of review. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). "An abuse of discretion involves far more than a difference in judicial opinion." *Id.* Rather, it occurs when "the result is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Id.* (citations omitted).

"A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." MCR 2.603(D)(1); *Alken-Ziegler, supra*, 233. Courts must consider the two elements separately and need not consider whether a meritorious defense exists when the moving party has failed to establish good cause. See *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 553 n 9; 620 NW2d 646 (2001). Good cause exists when there is (1) a procedural irregularity or defect in the proceedings on which the default is based, or (2) a reasonable excuse for the failure to comply with the requirements that created the default. *Alken-Ziegler, supra*, 230-235; *ISB Sales, supra*, 531-532.

In the instant case, defendants contend that the trial court erred in finding that they had failed to establish good cause. Specifically, defendants assert that a substantial irregularity or defect in the proceedings existed in that the amount of damages plaintiff requested in his applications for default differed from the amount requested in the complaint. They therefore contend that plaintiff's affidavit of default was defective and, under *Hosner v Brown*, 40 Mich App 515, 534; 199 NW2d 295 (1972) and *Francis v Yelle*, unpublished opinion per curiam of the Court of Appeals, issued May 29, 2003 (Docket Nos. 237406 & 244788), the order of default and all subsequent actions relying upon it must fail. Defendants further argue that the trial court erred in finding that they failed to raise this issue in a timely manner because they raised it at the first possible opportunity in their brief in opposition to plaintiff's motion for entry of default and judgment and in support of their motion to set aside default.

Contrary to the trial court's findings, defendants did argue that the amount requested in default differed from the amount listed in the complaint when initially challenging the entry of default. Nevertheless, defendants' claim is without merit. The Michigan Court Rules clearly allow a party seeking default to request an amount greater than that stated in the initial pleadings. MCR 2.603(B)(1)(a)(ii) states that a party requesting a default judgment must give notice of the request to the defaulted party if "the request for entry of a default judgment seeks relief different in kind from, or *greater in amount* than, that stated in the pleadings." (Emphasis added.) In contrast with their arguments on appeal, defendants appear to have conceded that such a change is proper by initially arguing that plaintiff failed to provide them with adequate notice under the court rule.¹ Consequently, a difference between the amount of damages requested in a complaint and the amount requested in a motion for entry of a default judgment does not constitute a procedural irregularity or defect in the proceedings.

Furthermore, defendants also assert that good cause existed because they had a reasonable excuse for their failure to comply with the requirements that created the default. Defendants refer to the regional power outage that occurred on Thursday, August 14, 2003 as the "reasonable excuse" for their failure to timely file their answer to plaintiff's complaint. However, on August 14, the day the answer was due, the power did not go out until 4:00 p.m. Defendants do not offer any proof to establish that, had the power not failed, they would have delivered the answer at the courthouse before it closed. In fact, defendant's attorney stated that he was in the process of finishing the affidavits that were to be filed with the answer when the power went out. Furthermore, the court re-opened on Monday, August 18, 2003, but defendants failed to file their answer until the following day, August 19. Defendant's attorney asserted that he "finalized the affidavits" on August 18. Therefore, defendants have failed to establish that a reasonable excuse for failure to comply existed.

The trial court did not abuse its discretion in finding that defendants failed to establish good cause to set aside the default as required by MCR 2.603(D)(1). Because defendants made

¹ Under MCR 2.603(B)(1)(b), notice "must be served at least 7 days before entry of the requested default judgment." In the instant case, defendants received notice when plaintiff served them with a copy of the motion for entry of default judgment on August 18, 2003. Defendants make no argument regarding notice on appeal.

no showing regarding good cause, the trial court properly refused to consider whether they presented a meritorious defense. *Zaiter, supra*, 553. We affirm the trial court's order entering the default judgment in favor of plaintiff.

Affirmed.

/s/ Brian K. Zahra

/s/ Hilda R. Gage

/s/ Christopher M. Murray